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No. 03-396

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HARRY SHUSTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Solicitor General's brief in opposition ("S.G. Br.") concedes that the federal courts of appeals are sharply divided on the proper interpretation of Rule 106 of the Federal Rules of Evidence and that the government needed to establish petitioner's ownership of Plus One Finance Limited ("Plus One") in order to prove his guilt. These concessions make clear that this case presents an important question whose resolution bears directly on petitioner's conviction, and thus that the petition warrants this Court's review.

To divert this Court from that straightforward conclusion, the Solicitor General claims that this petition does not squarely present the question upon which the courts have disagreed, seeks to minimize the importance of that question, and also argues that other evidence in any event established petitioner's ownership of Plus One. These arguments are insubstantial. This Court should grant certiorari to answer an important and recurring question that has long divided the courts of appeals and to reverse a ruling that enabled the government to present the jury with fundamentally distorted testimony about the central issue at trial.

1. The Solicitor General concedes that the federal courts of appeals disagree about whether Rule 106 authorizes the admission of otherwise inadmissible hearsay when the redaction of a written statement to eliminate hearsay would create a misleading impression about the meaning of the entire statement. S.G. Br. 7-8. The Solicitor General argues that the cases interpreting Rule 106 broadly to allow the introduction of otherwise inadmissible hearsay are distinguishable because they did not involve "the admission of testimony in a deposition." *Id.* at 8. The Solicitor General claims that because a deposition seeks to preserve testimony for trial, "parties are aware at the time of the deposition that any statements constituting inadmissible hearsay will not be admissible at trial" and that there is thus "no unfairness" in ap-

plying the general hearsay rules to deposition testimony offered at trial. *Id.* at 8-9. This circular argument ignores the text and purpose of Rule 106 and the reasoning of the cases holding that the Rule permits the introduction of otherwise inadmissible hearsay.

The text of Rule 106 does not distinguish between depositions and other forms of written or recorded statements. Rather, it applies when "a writing or recorded statement or part thereof is introduced by a party." Fed. R. Evid. 106. The Solicitor General has identified no principle and no case law that would justify excluding depositions alone from the universe of "writing[s] and recorded statement[s]" that trigger the application of the rule. Indeed, courts routinely apply Rule 106 to deposition testimony just as they apply it to other documents and writings. *See, e.g.*, *Trepel v. Roadway Exp., Inc.*, 194 F.3d 708, 718 (6th Cir. 1999) (vacating damages award so that district court could consider whether redaction of deposition was misleading); *United States v. Oseby*, 148 F.3d 1016 (8th Cir. 1998) (affirming district court decision allowing government to read jury deposition testimony arguably containing hearsay because it was "continuation" of non-hearsay testimony).

Though the cases that have adopted a broad reading of Rule 106 did not involve deposition testimony, this is a distinction without a difference. These cases have explained that the basic purpose of Rule 106 is "to correct a misleading impression created by taking matters out of context," *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986) (quoting Fed. R. Evid. 106, Advisory Committee Note), and that the rule "can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously." *Id.*; *see also Irons v. F.B.I.*, 880 F.2d 1446, 1453 (1st Cir. 1989) (Breyer, J.) (explaining that the "rule of completeness" allows the in-

troduction of evidence that "would not by itself have been admissible" in order to "avoid unfairness to others, such as adversaries in litigation who might suffer harm were a fact-finder to be misled, say, by a partial disclosure of relevant information"); *United States v. LeFevour*, 798 F.2d 977, 980-82 (7th Cir. 1986) (Posner, J.) (The "'completeness' rule codified in Rule 106" seeks to ensure that "a misleading impression created by taking matters out of context is corrected on the spot" and therefore allows the admission of "otherwise inadmissible evidence"). Authorities advocating this approach advance the same rationale. *See, e.g.*, 1 Stephen A. Salzburg et al., *Federal Rules of Evidence Manual* § 106.02[3], at 106-5 (8th ed. 2002) ("A party should not be able to admit an incomplete statement that gives an unfair impression, and then object on hearsay grounds to completing statements that would rectify that unfairness.") ("*Evidence Manual*"). The reasoning of these courts and commentators applies with full force to deposition testimony. Thus, the First Circuit has applied the reasoning of its ruling in *United States v. Awon*, 135 F.3d 96 (1st Cir. 1998), to allow the admission under Rule 106 of hearsay contained in the closely analogous context of grand jury testimony. *See United States v. Simonelli*, 237 F.3d 19, 28 (1st Cir. 2001), *cert. denied*, 534 U.S. 821 (2001).

The Solicitor General's circular "fairness" argument, *see* S.G. Br. 8-9, offers no good reason for Rule 106 to treat depositions differently than other documents. Though parties to a deposition may be aware that certain statements could be excluded as hearsay at trial, they cannot identify such statements with certainty in advance. More important, parties have no reason to suppose during a deposition that the trial court may later allow the admission of testimony redacted in a fundamentally misleading manner. To the contrary, parties reasonably expect that if a court cannot eliminate inadmissible materials without rendering the remaining portions misleading, it will exclude the deposition in its en-

tirety. Fundamental fairness demands nothing less. In short, the fact that this case involves a redacted deposition presents no meaningful distinction from the cases holding that Rule 106 permits the admission of otherwise inadmissible evidence. The Courts of Appeals disagree fundamentally about the scope of the rule of completeness embodied in Rule 106. An insignificant factual distinction will not bridge that difference; only intervention by this Court can resolve it.

2. The Solicitor General also suggests that this petition does not warrant this Court's review because the district court found that the redaction of Walton Imrie's deposition was not misleading. S.G. Br. 9-10. This argument fails for two reasons. First, the district court did not make such a definitive ruling. Second, even if the district court had found that the redaction of Imrie's testimony was not misleading, the Court of Appeals, following its longstanding reading of Rule 106, never reviewed that highly questionable conclusion, which was reversible under the clearly erroneous standard. For these reasons, if this Court rejects the Second Circuit's view of Rule 106, it will likely result in the reversal of petitioner's conviction.

a. As the Solicitor General recognizes, *see* S.G. Br. 4-5, petitioner objected to the proposed redactions of the deposition testimony of Imrie and Stephen Screech before the reading of those depositions to the jury. Petitioner claimed that the redactions were misleading and that Rule 106 permitted the admission of the hearsay statements needed to cure any misimpression. *See* Pet. App. D2-D3. The district court never addressed these objections, suggesting that the court believed itself bound by circuit precedent prohibiting the admission of hearsay under Rule 106. When petitioner objected during trial to the admission of specific statements without proper context, 7/17/01 Tr. 1484-85, the district court began by denying the requested clarification on the ground that the additional testimony was hearsay. *Id.* at

1485. As the Solicitor General notes, S.G. Br. 5, the district court went on to observe that "excluding [the hearsay] does not in the slightest fashion in my judgment render misleading the rest of the testimony in any way." 7/17/01 Tr. 1484-85.

The Solicitor General contends that this offhand statement conveyed a finding that all of the redactions, taken together, were not misleading. There is ample reason to doubt this conclusion. For example, immediately after making the statement quoted above, the district court castigated petitioner's counsel for failing to object to the particular testimony that he considered misleading: "If you thought some of the testimony in here is rendered misleading because of the excised testimony, then you should have objected to the reading of the testimony that you now claim is misleading." 7/17/01 Tr. 1485. The district court then noted its reluctance to "get lost in . . . far flung minutia about this case." *Id.* Because petitioner had plainly preserved his objection to the misleading overall effect of the redaction, S.G. Br. 4-5, these comments suggest that the district court was focused on the specific objection that petitioner's counsel had just raised, and not on the cumulative effect of all the redactions. Indeed, this view finds further support in the fact that when petitioner sought a mistrial claiming that the redactions had created a "completely distorted view" of the Imrie and Screech testimony, the district court denied the motion without making any finding that the redactions were not misleading. Under the circumstances, it would be erroneous to conclude that the district court ever clearly considered and then made a finding that the redactions were not misleading.

b. Even if the district court had explicitly found that the redaction of the Imrie deposition was not misleading, such a finding would not render this case unsuitable for this Court's review. Although the Court of Appeals reviewed other findings of the district court, *see* Pet. App. A8-A12, it never passed upon the district court's supposed conclusion that the

redaction was misleading. This omission was understandable, as circuit precedent firmly established that hearsay remains inadmissible under Rule 106, whether or not it is misleading. *See United States v. Guevara*, 277 F.3d 111 (2d. Cir. 2001), *cert. denied*, 123 S. Ct. 1613 (2003).

If the district court did find that the redacted testimony was not misleading, that finding would be extremely vulnerable to reversal by the Court of Appeals, if appellate review were not constrained by *Guevara*. As the government has now conceded, establishing petitioner's ownership of Plus One was essential to its case at trial. In its redacted form, the testimony of Imrie and Screech was the government's strongest evidence on this point. That testimony established that for more than five years petitioner gave investment instructions about the funds in Plus One, and that Imrie and Screech executed all those instructions without hesitation. This testimony showed that petitioner exercised effective control over funds in excess of two million dollars. But by excising all testimony explaining that Imrie and Screech accepted petitioner's instructions without reservation because they had been told that he was managing the funds for his parents, the district court left the jury with only one possible conclusion: that petitioner could exercise control over Plus One because he owned it.

The misleading quality of such a redaction is apparent. The district court's approach was analogous to allowing testimony that a professional money manager directed the investment of an account, while excising all evidence that he was an investment advisor with discretionary authority to manage the account. Under those circumstances, a jury determining the ownership of the funds could only conclude that the money manager was the beneficial owner. In the same way, the district court's redaction fundamentally distorted the testimony of Screech and Imrie and rendered it

entirely misleading.[1] To the extent that the district court ruled otherwise, that finding was clearly erroneous. But the Second Circuit's misreading of Rule 106 prevented it from reviewing that question. A ruling by this Court clarifying the application of Rule 106 would allow the Second Circuit to undertake a proper review of the record, and would therefore have a material impact on the proceedings below.

3. Finally, citing two cases that have held the exclusion of misleading hearsay to be harmless error, the Solicitor General suggests in a footnote that that the question presented "is not of great practical significance." S.G. Br. 10 n.8. Lacking any empirical support, this offhand suggestion cannot be verified, and is quite wrong. As the many cases cited in these briefs and catalogued in the leading treatises on evidence make clear, the question presented in this petition arises with considerable frequency. *See Evidence Manual* § 106.3; 1 Weinstein's Federal Evidence § 106.03 (2d ed. 2003). Simple logic compels the conclusion that the Second Circuit's narrow reading of Rule 106 has considerable "practical significance." In circuits following that rule, parties may introduce their opponents' inculpatory out-of-court statements as statements against interest or statements of

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[1] The Solicitor General contends that the redaction of the depositions was not misleading because the government presented other evidence that petitioner owned Plus One. S.G. Br. 11. This argument misses the mark because all the cited evidence was equivocal and subject to an innocent explanation. The evidence concerning petitioner's alleged admission of ownership, *see id.*, came from Jordan Belfort, a notorious fraudster and a confessed perjurer with a powerful motive to lie. Petitioner's previous statements about Plus One and his active role in its management, *see id.*, were all consistent with efforts to hide his parents' ownership of Plus One; such secrecy was necessary because South African law prohibited citizens from owning assets offshore. Standing alone, this evidence could not have carried the day. The testimony that petitioner exercised control over Plus One – misleadingly redacted to eliminate the explanation that he did so on behalf of his parents – was the strongest aspect of the government's case.

party opponents, *see* Fed. R. Evid. 801(d)(2), 804(b)(3), but related statements that provide context may remain inadmissible hearsay, even when the admission of the related statements is necessary to avoid confusion and misunderstanding. Though difficult to quantify, the impact of the Second Circuit rule is apparent. This Court should grant review to ensure uniformity.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition should be granted.

Respectfully submitted,

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